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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GWI PCS 1, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

JACOB M. LEWIS
ROBERT M. LOEB
H. THOMAS BYRON III
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Respondents were awarded 14 wireless telecommunications licenses by the Federal Communications Commission (FCC) after they submitted winning bids at auction totaling $1.06 billion. Shortly thereafter, in Chapter 11 proceedings commenced by respondents, the bankruptcy court confirmed a plan of reorganization permitting respondents to retain the licenses for $166 million, notwithstanding express license terms requiring full payment of the bid amount as a regulatory condition, and providing that the licenses automatically cancel in the event of failure to meet that condition. Relying on the judicially created, bankruptcy-law doctrine of "equitable mootness," the district court and court of appeals refused to consider the government's argument that the bankruptcy court's orders had improperly intruded on the FCC's regulatory authority. The questions presented are:

1. Whether it is proper for a court in bankruptcy proceedings to use the equitable mootness doctrine to override the FCC's exclusive statutory authority to issue and regulate licenses for electromagnetic spectrum.

2. Whether a bankruptcy court may treat respondents' obligation to pay their $1.06 billion winning bid as a constructive fraudulent conveyance on the basis of that court's own determination of the value of the licenses.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America, on its own behalf and that of the Federal Communications Commission. Respondents are GWI PCS 1, Inc., GWI PCS 2, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PCS 6, Inc., GWI PCS 7, Inc., GWI PCS 8, Inc., GWI PCS 9, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc., GWI PCS 14, Inc., General Wireless, Inc., and GWI PCS, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America and the Federal Communications Commission (FCC or Commission), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 230 F.3d 788. The opinion of the district court (Pet. App. 49a-59a) is reported at 245 B.R. 59. The orders of the bankruptcy court (Pet. App. 60a-100a, 101a-123a, 124a-126a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2000. A petition for rehearing was denied on

December 22, 2000. On March 14, 2001, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including April 21, 2001 (a Saturday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 and the Bankruptcy Code are reprinted in an appendix to this petition. Pet. App. 179a-200a.

STATEMENT

1. Because radio spectrum is limited, and to meet the need for orderly administration to avoid interference, Congress long ago conferred on a single federal agency exclusive authority to license users of radio spectrum. See *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) (citing, *e.g.*, *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 375-377, 387-388 (1969); *National Broad. Co.* v. *United States*, 319 U.S. 190, 210-218 (1943)). In particular, the Communications Act of 1934, as amended, 47 U.S.C. 301 *et seq.*, vests in the FCC the authority to grant radio licenses where the agency finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). Accord 47 U.S.C. 309(a). The FCC thus "serve[s] as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication,'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (footnotes omitted), and is "the expert body which Congress has charged to carry out its legislative policy," *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). See also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945). Similarly, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), and "no court can grant an applicant an

authorization which the Commission has refused," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942).

For many years, the FCC awarded spectrum licenses in comparative hearings, through which it attempted to determine which applicant would best utilize the spectrum. Concerned about the "substantial delays and burdensome costs" associated with the hearing process where multiple applications for the same license were filed, see H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), Congress in 1982 amended the Communications Act to authorize the Commission to award initial licenses to qualified applicants "through the use of a system of random selection," or lottery. 47 U.S.C. 309(i)(1) (1994 & Supp. IV 1998). The lottery system also proved unsatisfactory. Among other things, lotteries were criticized for "encouraging unproductive speculation for spectrum licenses" and failing "to reward persons who have spent money to research and develop a new technology or service." H.R. Rep. No. 111, 103d Cong., 1st. Sess. 248 (1993). By 1993, Congress concluded that allocating spectrum licenses through competitive hearings and lottery "ha[d] not served the public interest." *Ibid.*

Accordingly, in 1993 Congress amended the Communications Act to authorize the FCC to allocate spectrum licenses through a system of "competitive bidding" or auction. See 47 U.S.C. 309(j) (1994 & Supp. IV 1998). A system of public auctions, Congress explained, would eliminate unproductive speculation, because those who do not have an immediate plan to put spectrum to valuable use will generally be unwilling to pay very much for it. "Because new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, *supra*, at 249. Consistent with that observation, new Section 309(j) of the Act directed the Commission to develop a competitive bidding methodology that, among other things,

(1) aids in the "development and rapid deployment of new technologies, products, and services * * * without administrative or judicial delays," (2) avoids excessive concentration of licenses, (3) recovers "a portion of the value of the public spectrum resource made available for commercial use," and (4) promotes "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. 309(j)(3)(A)-(D) (1994 & Supp. IV 1998). At the same time, Congress expressly preserved the FCC's exclusive regulatory role. "Nothing in this subsection, or in the use of competitive bidding," Section 309(j) declares, "shall * * * diminish the authority of the [FCC] * * * to regulate or reclaim spectrum licenses." 47 U.S.C. 309(j)(6)(C).

Pursuant to that authority, the FCC established a system of simultaneous multiple round auctions for awarding broadband personal communications services (PCS) licenses. See Fifth Report and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 5532, 5542, ¶ 27 (1994).[1] The Commission concluded that such a system of competitive bidding would best serve the interests identified by Congress. *Ibid.* The Commission explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in

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[1] Broadband PCS permits a "new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." 9 FCC Rcd at 5534, ¶ 3.

> each area and the efficient and intensive use of the spectrum.

Second Report and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, 2361, ¶ 71 (1994). See also *id.* at 2360, ¶ 70 ("auction designs that award licenses to the parties that value them most highly will best achieve" statutory goals); 9 FCC Rcd at 5543, ¶ 29 (multiple round auctions "increas[e] the likelihood that" licenses will be "acquired by those who value them most highly").

FCC regulations expressly provide that the grant of a spectrum license is "conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a); see also 47 C.F.R. 1.2109(a) (same). In the case of companies that elect to pay for their licenses in installments, the FCC's rules provide that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. 1.2110(e)(4) (1996). Failure to make timely payment triggers automatic cancellation of the license. 47 C.F.R. 1.2110(e)(4)(iii) (1996).

2. Pursuant to the competitive bidding provisions of Section 309(j), the FCC auctioned 493 "C-Block" broadband PCS licenses in the summer of 1996. Pet. App. 3a.[2] Respon-

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[2] The FCC divided the spectrum for broadband PCS into six blocks, denominated by the letters "A" through "F." See Pet. App. 6a n.7; 9 FCC Rcd at 5535, ¶ 6. Each of the A and B block licenses covered one of the 51 Major Trading Areas in the United States and its territories, as identified by the Rand-McNally Commercial Atlas & Marketing Guide; each of the C, D, E, and F block licenses covered one of the 493 Basic Trading Areas identified by the same Guide. *Ibid.* The A, B, and C block licenses covered 30 MHz of spectrum each; the D, E, and F block licenses covered 10 MHz of spectrum each. *Ibid.* In accordance with the statute's mandate that the FCC avoid "excessive concentration of licenses" and promote the dissemination of licenses "among a wide variety of applicants," 47 U.S.C.

dent GWI PCS, Inc.—a subsidiary of respondent General Wireless, Inc., and parent of the licensee respondents—offered winning bids totaling $1.06 billion and was declared the high bidder for 14 licenses, covering areas in Southern Florida, Northern California, and Atlanta.[3] Pet. App. 3a-4a. After the FCC concluded its investigation into the licensing qualifications of GWI PCS, the licenses were granted on January 27, 1997. *Id.* at 4a-5a; Memorandum Opinion and Order, *Applications of GWI PCS, Inc. for Authority to Construct and Operate Broadband PCS Systems Operating on Frequency Block C*, 12 FCC Rcd 6441, 6458, ¶ 42 (1997).[4] On February 3, 1997, respondent GWI PCS, Inc. deposited additional funds to satisfy its down-payment obligation (ten percent of its winning bids), Pet. App. 5a; see 47 C.F.R.

309(j)(3)(B); see also 47 U.S.C. 309(j)(4)(C), 47 U.S.C. 309(j)(4)(D) (1994 & Supp. IV 1998), the C-Block auction was open only to "entrepreneur applicants" with less than $125 million in gross revenues during the previous two years, and assets totaling less than $500 million at the time of the auction. 47 C.F.R. 24.709(a)(1) (1996). Applicants eligible for the C-Block auction were permitted to pay ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2) (1996), with the remaining balance to be paid in installments over the ten-year license term at below-market interest rates, 47 C.F.R. 24.711(b) (1996). For an applicant—such as respondent GWI PCS, Inc.—that qualified as a "small business," the interest rate was the rate for ten-year U.S. Treasury obligations on the day the license was granted, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3) (1996).

[3] At the request of respondent GWI PCS, Inc., the FCC issued the licenses to 14 corporate subsidiaries, GWI PCS 1, Inc. through GWI PCS 14, Inc. Pet. App. 5a.

[4] Two parties filed objections to GWI PCS's applications for the licenses, contending that GWI PCS had violated the Act's foreign ownership restrictions and the FCC's rules against collusive bidding. See 12 FCC Rcd at 6441, ¶ 1. After investigating the objections, the FCC concluded that GWI PCS did not exceed the foreign ownership limitations and that there was insufficient evidence to find that GWI PCS had violated the FCC's rules prohibiting collusion. *Id.* at 6451, 6458, ¶¶ 26, 41.

24.711(a)(2) (1996), and in March of 1997 the respondent licensees executed promissory notes for approximately $954 million, the remaining 90% of the bids. Pet. App. 6a.

The terms of the licenses—like the text of respondents' notes and Security Agreements—made clear that the licenses were conditioned on "full and timely payment of all moneys due" and that failure to comply with that requirement "will result in automatic cancellation of" the licenses. See, *e.g.*, Pet. App. 175a.[5] The Commission's rules made that clear as well. See 47 C.F.R. 1.2110(e)(4) (1996) ("A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations."); 47 C.F.R. 1.2110(e)(4)(iii) (1996) ("Following expiration of any grace period without successful resumption of payment * * * or upon default * * * the license will automatically cancel.").

3. Following the auction and license awards, a number of C-Block licensees experienced difficulties in securing the financing they needed to pay their bids. As a result, several petitioned the FCC for relief from their installment payment obligations. In response, the FCC temporarily suspended all C-Block installment payments effective March 31, 1997 (before respondents' first installment was due), and instituted a proceeding to consider whether and to what extent to restructure the obligations of the C-Block licensees as a group. Second Report and Order and Further Notice of Proposed Rule Making, *Amendment of the Commission's Rules Regarding Installment Payment Financing for*

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[5] Respondents' notes stated that the licenses were "conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan," and that the Commission's "enforcement authority" would not be affected. B.R. Tab 28, Gov't Exh. 260, at 3. Respondents' security agreements stated that "continued retention of the License[s]" was "conditioned upon compliance" with all Commission orders and regulations. B.R. Tab 28, Gov't Exh. 261, at 7.

Personal Communications Services (PCS) Licensees, 12 FCC Rcd 16,436, 16,444-16,446, ¶¶ 14-17 (1997). After more than six months of administrative proceedings, the FCC adopted several options designed to assist C-Block licensees in restructuring their obligations. However, the FCC explicitly rejected proposals that would have allowed licensees to retain their licenses without paying their winning bids in full or would otherwise have "result[ed] in a dramatic forgiveness of the debt owed." *Id.* at 16,447, ¶ 19. Such results, the Commission explained, would "be very unfair to other bidders," who might have bid differently if they had known that the payment terms might be changed after the fact. *Ibid.* Moreover, the Commission observed, a dramatic change in payment obligations after auction would "gravely undermine the credibility and integrity of [its] rules" in future auctions. *Ibid.* The Commission ultimately gave licensees until June 8, 1998 to avail themselves of the options for restructuring their obligations, and until October 29, 1998 (at the latest) to resume payments consistent with their June 8 election. Pet. App. 7a. See also Second Order on Reconsideration of the Second Report and Order, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 14 FCC Rcd 6571, 6573, ¶ 3 (1999).

On appeal, the D.C. Circuit upheld the restructuring orders. The D.C. Circuit explained that "an agency cannot, in fairness, radically change the terms of an auction after the fact." *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 235 (2000). The limited restructuring the Commission had permitted, the D.C. Circuit held, was permissible because the Commission had carefully balanced the concerns of fairness and auction integrity. The FCC, the court pointed out, "did not simply forgive agreed-upon payments, much less grant the winning bidders' more sweeping requests for relief." *Ibid.*

4. Following the FCC's release of its restructuring orders, all but a handful of C-Block licensees made their elections as required, and many licensees returned significant amounts of spectrum for which they could not pay their bids. Although respondent GWI PCS, Inc. had participated in the restructuring proceeding, respondents did not effectively avail themselves of the alternatives offered by the FCC to address the licensees' concerns. Nor did they pursue judicial review of the FCC's orders. Instead, shortly after the FCC released its restructuring decision, the licensee respondents (later joined by their corporate parent) filed for bankruptcy. They quickly commenced an adversary proceeding in bankruptcy court against the FCC, seeking to retain their licenses while avoiding their payment obligations on the ground that those obligations constituted a constructively fraudulent conveyance under 11 U.S.C. 548 (1994 & Supp. V 1999).

The bankruptcy court avoided $894 million of respondents' $1.06 billion payment obligation to the FCC as a constructively fraudulent conveyance, while permitting respondents to retain their licenses. Pet. App. 124a-126a; *id.* at 127a-166a. In general, a conveyance is considered constructively fraudulent if it is made for less than reasonably equivalent value. In this case, the bankruptcy court concluded that respondent GWI PCS, Inc. had not incurred an obligation to pay the full amount of its bid at the time of the auction; instead, the court held, the payment obligation did not arise until the licensee respondents actually received the licenses, some eight months later. *Id.* at 146a. By that time, the court stated, the value of the licenses had declined from the $1.06 billion bid amount to approximately $166 million. *Id.* at 142a, 163a. Because respondents' payment obligation exceeded the value of the licenses received, the court held the exchange to be constructively fraudulent and entered an order reducing respondents' total payment obligation to $166

million; it thus avoided $894 million of respondents' debt. *Id.* at 124a-126a, 151a-152a.

The bankruptcy court also prohibited the FCC from enforcing the full payment condition on the licenses or otherwise cancelling them. The court rejected the government's argument that it lacked authority to change the terms of the licenses, and that non-payment of the full bid amount would result in automatic, regulatory license cancellation. The full-payment requirement, the court stated, was a financial rather than regulatory requirement. Pet. App. 158a-159a. The government appealed to the district court. While the government's appeal was pending, and over the government's objection, the bankruptcy court confirmed a plan of reorganization, based on its prior ruling that respondents could retain the licenses while avoiding nearly $900 million of their payment obligation to the FCC. *Id.* at 61a-99a, 101a-123a. The government also appealed the confirmation order, and its appeals were eventually consolidated.

The government sought a stay of both the adversary judgment and the confirmation order. The bankruptcy court permitted the government 24 hours to seek a stay pending appeal of the confirmation order. Pet. App. 99a. The district court entered a temporary stay on September 10, 1998, which expired by its terms on September 30, 1998. *Id.* at 18a. That same day, then-Chief Judge Politz of the Fifth Circuit issued a stay "to preserve the status quo and jurisdiction until * * * [that] court ha[d] an appropriate opportunity to determine whether to stay the [bankruptcy court's orders] until appeals therefrom are finally resolved." *Id.* at 169a-170a. That stay was lifted by a panel of the Fifth Circuit on October 7, 1998, without explanation. *Id.* at 167a-168a (treating emergency petition for stay as petition for writ of mandamus and denying it; lifting stay entered Sept. 30, 1998).

The government's consolidated appeals remained pending in the district court while the debtors proceeded, in the absence of a stay, to engage in some of the transactions called for by the confirmed plan. After more than a year, the district court dismissed the bulk of the government's appeals, concluding that the case had become "equitably moot." Although the government's challenge to the confirmed plan was "live" in a case-or-controversy sense, the court held that it should not be entertained because the plan of reorganization had been substantially consummated while the appeal was pending and the rights of investors would be affected if the government's challenge to the plan were to prevail. Pet. App. 52a-57a. Without identifying the portions of the appeal that remained before it, the district court "denie[d] the United States' remaining claims with respect to the Avoidance Judgment." *Id.* at 57a.

5. The court of appeals affirmed. Pet. App. 1a-47a. The court acknowledged that the bankruptcy court may have improperly "tak[en] onto itself a quasi-regulatory function held by the FCC" by allowing respondents to retain the licenses without satisfying the licenses' full-payment condition. *Id.* at 31a. The court further noted that the Second Circuit, in *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (1999), cert. denied, 121 S. Ct. 298 (2000), had reversed an almost indistinguishable bankruptcy court judgment on precisely those grounds. Pet. App. 32a-33a. There too, the bankruptcy court had dispensed with the payment obligation of the licenses, and ordered that the FCC permit the licensee to retain its licenses, on the theory that the payment obligation was a financial rather than regulatory requirement. 200 F.3d at 54. The Second Circuit rejected that approach as "fundamentally mistaken." *Ibid.* The payment obligation, the Second Circuit held, was an indispensable part of a market-based license allocation mechanism designed to identify the highest-value user of the spectrum.

"By holding that for a price of $1.023 billion [the debtor] would retain licenses for which it had bid $4.74 billion," that court explained, "the bankruptcy and district courts" had improperly "impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 55. See Pet. App. 32a-33a.

The court of appeals in this case, however, declined to address the FCC's effort to vindicate its regulatory powers, or to confront the FCC's claim that the bankruptcy court order had undermined the integrity of its system of license allocation. Instead, the court held that the FCC's appeal had become "equitably moot." Pet. App. 32a. "Equitable mootness," that court explained, "'is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions.'" *Id.* at 22a (quoting *In re Manges*, 29 F.3d 1034, 1038-1039 (5th Cir. 1994), cert. denied, 513 U.S. 1152 (1995)). "When evaluating whether an appeal of a reorganization plan in a bankruptcy case is [equitably] moot," the court stated, the Fifth Circuit "examines whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of parties not before the court or the success of the plan." *Ibid.* The court concluded that all three factors weighed in favor of dismissing the FCC's claim that the bankruptcy court had intruded on the FCC's regulatory authority by enjoining the FCC's enforcement of its regulatory payment requirements and by altering the terms of respondents' licenses. *Id.* at 29a-32a.

The court of appeals concluded that the government's appeal of the fraudulent conveyance ruling was not equitably moot; it therefore addressed that issue on the merits. The court acknowledged that the Second Circuit—again in

NextWave—had recently rejected a fraudulent conveyance claim virtually indistinguishable from the one accepted by the bankruptcy court in this case. Pet. App. 37a, 40a. Deferring to the FCC's regulatory decisions, and relying on general auction principles, the Second Circuit in that case had concluded that the bidder's obligation to pay attached at—and that reasonably equivalent value must be measured as of—the close of the auction. Because "the winning bid[] at * * * auction" by definition represented "the fair market values of" of the licenses, the Second Circuit held, the bidder's exchange of its promise to pay for the licenses for the auction price could not be a "fraudulent conveyance." *NextWave*, 200 F.3d at 56-57.

In this case, the Fifth Circuit "respectfully disagree[d]" with the Second Circuit's *NextWave* decision. Pet. App. 37a, 40a. In contrast to the Second Circuit, the Fifth Circuit refused to defer to the FCC's construction of its regulations, dismissing the FCC's decisions as mere "litigation position[s]." *Id.* at 36a-39a. And the Fifth Circuit rejected the contention that the bidder's obligation to pay attached at the close of the auction. *Id.* at 39a-47a. Instead, the court held that respondents' obligation to pay did not attach until the licenses were actually issued. Accordingly, accepting the bankruptcy court's determination that the licenses had fallen in value between the auction and the award of the licenses, the Fifth Circuit concluded that the exchange was constructively fraudulent. *Id.* at 46a-47a.

The court of appeals denied the government's petition for rehearing and rehearing en banc on December 22, 2000. Pet. App. 127a-129a.

REASONS FOR GRANTING THE PETITION

Although the court of appeals concluded that the bankruptcy court's orders in this case may have usurped the Federal Communications Commission's authority over spec-

trum licensing—and undermined the Commission's license allocation mechanism—the court of appeals declined to review those orders or otherwise vindicate the Commission's authority on appeal. In support of that decision, the court of appeals did not rely on statutory authority, principles of justiciability, or constitutional command. Instead, the court invoked judge-made principles of equity. In particular, the court held that the bankruptcy-law doctrine of "equitable mootness" permitted it to affirm notwithstanding the illegality of the bankruptcy court's orders, and notwithstanding the bankruptcy court's usurpation of the FCC's regulatory authority. That holding is incorrect and represents a substantial intrusion into the regulatory authority Congress has conferred on federal administrative agencies. Indeed, in this very case, the decision undermines and distorts the increasingly important market-based system of license allocation that Congress established in 47 U.S.C. 309(j) (1994 & Supp. IV 1998), and that the FCC has implemented through its carefully crafted auction system. For those reasons, and because the decision below concededly conflicts with a decision of the Second Circuit on a closely related issue, review by this Court is warranted.

A. The FCC "serve[s] as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (footnotes omitted). See also *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945). Consequently, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), and "no court can grant an applicant an authorization which the Commission has refused," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942). When Congress granted the FCC statutory authority to allocate

spectrum licenses by auction, it expressly preserved the FCC's exclusive authority in that domain. "Nothing in this subsection, or in the use of competitive bidding," the Communications Act declares, "shall * * * diminish the authority of the" FCC "to regulate or reclaim spectrum licenses." 47 U.S.C. 309(j)(6)(C).

Consistent with that delegation of authority to the Commission, the Second Circuit concluded in *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (1999), cert. denied, 121 S. Ct. 298 (2000), that a bankruptcy court exceeds its authority if it attempts to alter the terms and conditions of FCC spectrum licenses, or otherwise intrudes on the FCC's regulatory authority over spectrum allocation. In that case, the debtor had submitted winning bids of more than $4 billion for spectrum licenses but had defaulted on its bid obligations. Notwithstanding the express terms of the Commission's rules, the bankruptcy court there—like the bankruptcy court here—had ordered the FCC to permit the debtor to retain its spectrum licenses in exchange for a fraction of the licensee's winning bids. And like the bankruptcy court here, the bankruptcy court there treated the FCC's payment requirement as a mere financial arrangement subject to readjustment in bankruptcy.

Reversing, the Second Circuit explained that the FCC's full payment requirement is not a financial condition but a regulatory one. Reviewing the history and design of the FCC's market-based spectrum allocation mechanism, see pp. 3-5, *supra*, the Second Circuit held that Congress and the FCC had used the licensee's "willingness and ability * * * to pay more than its competitors" as a means of determining that the licensee would put the spectrum to its highest-value use; as a result, the debtor's "inability to follow through on [those] financial undertakings had more than financial implications." *NextWave*, 200 F.3d at 54. Rather, "[i]t indicated that under the predictive mechanism created by

Congress to guide the FCC," the debtor was "not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* The Second Circuit therefore held that the bankruptcy court order requiring the FCC to permit the licensee to retain the licenses despite its failure to meet the express payment condition had "impaired the FCC's method for selecting licensees"; had impermissibly "exercised the FCC's radio-licensing function"; and had improperly sought to "collaterally attack or impair * * * the license allocation scheme developed by the FCC." *Id.* at 55. See also *id.* at 55 n.11 ("[A]s we have repeatedly stated," the bankruptcy court's "analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocator of licenses. Such was the case here."). The Second Circuit reached that same conclusion again on mandamus after remand. *In re FCC*, 217 F.3d 125, 133-139 (timely payment requirement is regulatory condition), cert. denied, 121 S. Ct. 606 (2000).

In this case, the bankruptcy court—by ordering the FCC to permit respondents to retain their spectrum licenses notwithstanding their failure to meet an express regulatory condition, and by effectively amending the terms of the licenses—similarly usurped the FCC's exclusive regulatory function. Pet. App. 31a. And the Fifth Circuit acknowledged that the bankruptcy court "possibly *erred* in * * * taking onto itself a quasi-regulatory function held by the FCC." *Ibid.* See also *id.* at 33a n.11 ("[I]f the issue were not equitably moot, we might agree with the Second Circuit and reverse."). But the court of appeals refused to entertain the FCC's appeal or otherwise remedy the intrusion on that agency's regulatory powers. Instead, relying on the judge-made doctrine of "equitable mootness," the court declined even to review the legality of the bankruptcy court's orders. Although the case was not "moot" in an Article III, case-or-

controversy sense, *id.* at 22a, the court concluded that it could decline to address the government's appeal in light of three factors: (1) that the government was unable to obtain a stay of the debtor's plan of reorganization, *id.* at 23a-24a; (2) that a significant number of transactions had occurred under that plan while the government's appeal was pending, *id.* at 24a-28a; and (3) that granting relief would detrimentally affect investors and make it less likely that the plan would succeed, *id.* at 28a-29a.

1. The Fifth Circuit's application of the doctrine of equitable mootness in this context—to protect a court's usurpation of agency authority—cannot be reconciled with Congress's allocation of regulatory powers. The Fifth Circuit effectively transferred the FCC's congressionally granted regulatory authority over spectrum licensing to the bankruptcy court because of the passage of time and the perceived equities of the circumstances. No valid legal principle permits federal courts to exercise, based on the equities, the regulatory authority that Congress has assigned to the executive; nor is an appellate court justified in refusing to remedy such usurpation based on its own view of the equities.

To the contrary, this Court has observed that it would be "problematic" even to permit bankruptcy courts "to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity," both "because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts." *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin.*, 502 U.S. 32, 40 (1991). As the Court has explained, because it is the administrative agency "that has been entrusted by Congress with authority" in this area, "wise administration * * * demands that the bankruptcy court accommodate itself to the administrative pro-

cess." *Nathanson* v. *Labor Bd.*, 344 U.S. 25, 30 (1952). The Fifth Circuit's decision inverts that approach, requiring the agency to accommodate itself to the bankruptcy court's exercise of the agency's powers, based on perceived equities and reliance interests of private parties.

2. The Fifth Circuit's use of equitable mootness to bar a federal agency's efforts to vindicate its regulatory powers following their usurpation has broad ramifications for the authority of federal and even state agencies, as well as the relationship between those agencies and bankruptcy courts. Through myriad statutes, Congress and the States have allocated regulatory authority in important areas, such as public health and welfare, environmental protection, and even hazardous waste disposal, to administrative agencies. The decision below exposes each of those delegations to potentially unreviewable usurpation. Under it, the government may be rendered helpless in its effort to recover regulatory powers necessary to protect the public interest through appeal any time a court concludes that it would be inequitable—based on the absence of a stay, the reliance interests of private parties, and a perceived need to protect the reorganized entity—to correct the usurpation.

The Fifth Circuit's application of the doctrine of equitable mootness in this context, moreover, substantially undermines Congress's and the FCC's market-based license allocation mechanism. In promulgating the ground rules for competitive bidding, the FCC proceeded on the premise—shared by Congress—that a system of auctions would ensure that spectrum is awarded to the most efficient and effective user. See pp. 3-5, 15-16, *supra*; Second Report and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, 2361, ¶ 71 (1994) (because "a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an

auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum"); *id.* at 2360, ¶ 70 ("auction designs that award licenses to the parties that value them most highly will best achieve" the statutory goals); H.R. Rep. No. 111, *supra*, at 249 (auctions will "ensure that spectrum is used more productively and efficiently than if handed out for free").

Under the FCC's rules, all licenses so allocated are "conditioned upon full and timely payment of the winning bid amount," 47 C.F.R. 24.708(a) (1996), or "full and timely performance of the licensee's payment obligations" under any "installment plan," 47 C.F.R. 1.2110(e)(4) (1996). That condition is a critical element of the allocation mechanism, which looks not merely to *ex ante* willingness to promise to pay, but to a licensee's ability to follow through with its promise. Pet. App. 7a ("The FCC * * * expressly rejected proposals that would have allowed licensees to retain their licenses without paying their winning bids in full, because, in the FCC's view, the C-block auction had been designed to ensure that the licenses were to be allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses."). Because the FCC had used respondents' "willingness and ability * * * to pay more than [their] competitors as the basis" to conclude that respondents would best utilize the licenses, respondents' "inability to follow through * * * had more than financial implications." *NextWave*, 200 F.3d at 54. Instead, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC," respondents were "not the applicant[s] most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* Yet, under the

court of appeals' decision, respondents may now retain those licenses nonetheless.

The court of appeals' decision, moreover, threatens ongoing distortion of the FCC's auction process. The FCC specifically decided, as a matter of regulatory policy, *not* to permit C-Block bidders to retain their licenses without making full payment, because to do so would undermine the integrity of the auction process. Second Report and Order and Further Notice of Proposed Rule Making, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, 16,447, ¶ 19 (1997); Pet. App. 7a. See also pp. 7-9, *supra*; *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (recognizing importance of enforcement of auction rules). In particular, offering such relief might encourage speculative bidding in future auctions—risky bids made in the hope that, if the license values did not rise and financing materialize, the FCC might permit the bidder to retain the licenses nonetheless. The court of appeals' decision, by allowing bankruptcy courts to offer the very relief the FCC rejected as a regulatory matter, would create precisely the incentives the FCC sought to avoid.[6]

3. The court of appeals' application of the equitable mootness doctrine to preclude the FCC from rightfully reclaiming its congressionally granted powers is particularly troubling given that doctrine's lack of statutory foundation. As the court of appeals acknowledged (Pet. App. 22a), the

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[6] We do not suggest, of course, that well-established businesses with much to lose in bankruptcy will be encouraged to place risky bids at auction. But where the business has less to lose in bankruptcy—such as where the licenses will be the business's major and perhaps only asset—the prospect of being able to retain the licenses on better terms through bankruptcy inevitably would distort bidding incentives.

doctrine of "equitable mootness" bears no relation to the justiciability doctrine of actual mootness, which has its origins in the case-or-controversy requirement of Article III. See *In re Continental Airlines*, 91 F.3d 553, 558-559 (3d Cir. 1996) (en banc), cert. denied, 519 U.S. 1057 (1997). Nor is the doctrine based on a specific provision of the Bankruptcy Code. Instead, equitable mootness is a doctrine of abstention, developed by the lower federal courts over the past 20 years, under which they will sometimes refuse to hear otherwise proper appeals from confirmed plans of reorganization.

Under the Bankruptcy Act of 1898, appellate courts sometimes refused (in the absence of a stay) to overturn a court-approved *sale* of property *from* the estate to a good faith purchaser. See, *e.g.*, *In re Abingdon Realty Corp.*, 530 F.2d 588, 590 (4th Cir. 1976) (citing cases).[7] After Congress enacted the Bankruptcy Code in 1978, however, the Ninth Circuit took that principle further, insulating from appellate review an entire "plan of arrangement," and establishing "the principle of dismissal of an appeal for lack of equity." *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981); see also *ibid.* (failure to seek stay "creates a situation rendering it inequitable to reverse the orders appealed from").[8] In the

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[7] Former Bankruptcy Rule 805 had codified that rule. See *Abingdon Realty*, 530 F.2d at 590 ("the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal," in the absence of a stay) (quoting Bankruptcy Rule 805). See also Michael A. DiSabatino, Annotation, *Stay of Judgment or Order of Referee Pending Appeal, Under Rule 805 of Rules of Bankruptcy*, 44 A.L.R. Fed. 896 (1979). Current Bankruptcy Rule 8005 includes no such provision, but a limited application of the principle appears in the Bankruptcy Code. See 11 U.S.C. 363(m), 364(e).

[8] Notably, the analysis of equity in *Roberts Farms* (and other early cases) turned on the appellant's failure to *seek* a stay. It was not until much later that the courts began to apply the doctrine to cases in which an

ensuing 20 years, other courts of appeals too have invoked equity, discretion, and prudential factors to dismiss some appeals challenging confirmed plans of reorganization—although they have not always agreed about the limits of the doctrine or the factors dictating its application.[9] In addition to notions of equity, some courts have sought to justify their decisions by reference to a perceived bankruptcy policy preference favoring successful reorganizations.[10] Courts have also invoked the interests of third parties who may have relied on the plan, including customers and vendors, as well as investors.[11]

As the foregoing discussion attests, the doctrine of equitable mootness is a relatively recent judicial construct of questionable foundation. This Court has never endorsed it, and no court has ever identified a provision of the Bankruptcy Code authorizing it. Indeed, to the extent the Bankruptcy Code addresses the issue, it appears to preclude the doctrine. The Bankruptcy Code specifically identifies the sorts of bankruptcy court orders that, absent a stay

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appellant had unsuccessfully sought a stay. *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), cert. denied, 513 U.S. 999 (1994); see also *In re Manges*, 29 F.3d 1034, 1040 (5th Cir. 1994), cert. denied, 513 U.S. 1152 (1995).

[9] See, *e.g.*, *In re U.S. Brass Corp.*, 169 F.3d 957, 962 (5th Cir. 1999); *Continental Airlines*, 91 F.3d at 560; *UNR Indus.*, 20 F.3d at 769; *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993); *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992); *In re AOV Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); see also *Continental Airlines*, 91 F.3d at 570 (Alito, J., dissenting) ("the holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested").

[10] See, *e.g.*, *In re Berryman Prods.*, 159 F.3d 941, 944 (5th Cir. 1998); *Manges*, 29 F.3d at 1038 n.6; *In re Public Serv. Co.*, 963 F.2d 469, 471-472 (1st Cir.), cert. denied, 506 U.S. 908 (1992); *In re Crystal Oil Co.*, 854 F.2d 79, 81-82 (5th Cir. 1988).

[11] See, *e.g.*, *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994); *Crystal Oil*, 854 F.2d at 81; *Continental Airlines*, 91 F.3d at 562.

pending appeal, will become unreviewable. See 11 U.S.C. 363(m) (specifying that certain sales and leases of property of the debtor's estate to a purchaser in good faith cannot be amended or reversed on appeal, unless the sale or lease is stayed during the appeal's pendency); 11 U.S.C. 364(e) (similar rule for good-faith extensions of credit). The Code does not, however, provide that an entire plan of reorganization can become unreviewable based on the absence of a stay and the reliance of investors. Under the maxim of *expressio unius est exclusio alterius*, Congress's express inclusion of two bankruptcy-law exceptions to appellate review indicates an intent to preclude the recognition of others. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). The doctrine, moreover, is open to substantial abuse, and invites manipulation of the bankruptcy process.[12]

In any event, whatever the merits of the doctrine of equitable mootness generally, the policy interests on which it rests simply cannot justify its application in cases like this one. Even if the bankruptcy system can be said to have an unstated bias in favor of protecting plans of reorganization, as some courts have stated, that generalized policy preference offers no basis for disregarding the FCC's exclusive authority over spectrum licensing, a power that is firmly

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[12] Because substantial consummation of the confirmed plan will, under the doctrine of equitable mootness, preclude appeal if no stay is obtained, a debtor seeking confirmation sometimes will have investors standing at the ready, prepared to inject funds into the debtor the moment the plan is confirmed. Indeed, precisely that occurred in *NextWave*; equitable mootness was avoided only when the government managed to obtain a pre-confirmation stay pending appeal. The prospect of equitable mootness puts great pressure on the litigants and the judiciary at the preliminary stage of the case when a stay is sought, and puts an objecting party at a considerable disadvantage because, if he does not obtain a stay, his rights may forever be lost.

rooted in the statutory text of the Communications Act. In other contexts, this Court has been quick to reject efforts to ascertain the generalized intent or purpose of a legislative scheme as a means of interpreting the statute's effect. "We are not willing to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended." *Garcia* v. *United States*, 469 U.S. 70, 78 (1984); see also *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and * * * prevents the effectuation of congressional intent.").

Nor can considerations of general equity—whether fairness to new investors, the debtor, or other private parties—justify depriving the executive branch of its congressionally vested authority to regulate in the public interest. This Court has repeatedly rejected efforts to deprive the government of public rights using doctrines based on equity or developed for the resolution of private disputes. "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *United States* v. *California*, 332 U.S. 19, 40 (1947) (government not subject to equitable doctrines affecting title, such as adverse possession or laches); see also, *e.g.*, *OPM* v. *Richmond*, 496 U.S. 414 (1990) (equitable estoppel cannot create right to recover money from the Treasury); *California*, 332 U.S. at 39-40; compare *City of Covington* v. *Covington Landing Ltd. P'ship*, 71 F.3d 1221, 1226 (6th Cir. 1995) (characterizing equitable mootness as a form of equitable estoppel). For the same reason, it was improper for the court of appeals to apply equitable mootness—a doctrine that until now had been used exclusively to deny the finan-

cial claims of private parties—to defeat the government's assertion of its regulatory powers.

Perhaps the greatest irony of this case, however, is the evident *inequity* of applying equitable mootness here.[13] There is nothing "equitable" about subjugating the public interest, which Congress directed the FCC to pursue, to the private interests of a few (perhaps speculative) investors or the reorganized debtor. (That is particularly true given that the private investors in this case knowingly undertook the risk that the plan of reorganization might be upset on appeal; the plan specifically provided for such a contingency through a litigation alternative. Pet. App. 15a.) And there is nothing equitable about a decision that frustrates the scheme Congress established for regulating the airwaves and affords respondents vastly more favorable treatment than other, similarly situated licensees who, consistent with the FCC's orders, returned their spectrum when they proved unable to pay. Unlike almost every other licensee experiencing financial difficulties, respondents chose not to avail themselves of the FCC's restructuring options, which required licensees to pay the winning bid amounts for the licenses they retained, while offering options for relief within the regulatory parameters of the established auction mechanism (such as returning some licenses while keeping others, or returning some portions of spectrum). Respondents sought instead to use bankruptcy as an end-run around the regulatory process, and have used it to obtain precisely the "dramatic forgiveness" of license conditions—while keeping their licenses—

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[13] Indeed, the Fifth Circuit made no effort to balance or even address all of the interests and equities in this case. Instead, it mechanically applied three factors (absence of a stay, implementation of the plan, and the effect on third parties not before the court) identified by prior cases. Nowhere did the court of appeals consider the ultimate equity, the public interest, including the effect on the integrity of future auctions, or the unfairness to other bidders.

that the FCC itself had, for sound regulatory reasons, decided not to offer. See pp. 7-8, 19-20, *supra*. Whether a party obtains relief from a regulatory requirement should not depend on whether that party sought relief from a bankruptcy court or from the regulator itself; as this Court recently explained, "bankruptcy does not alter the burden imposed by the substantive law." *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 17 (2000).

Nor is there equity in the windfall that resulted. For the $166 million payment calculated by the bankruptcy court, respondents may now retain licenses that the auction process originally valued at $1.06 billion dollars—and that are likely worth even more now. Indeed, in *NextWave*, the bankruptcy court estimated that the licenses there, which were from the same auction as respondents', had fallen in value from $4.7 billion to about $1 billion. When the FCC recovered those licenses after appeal and reauctioned them, however, the bidding topped $15 billion, more than three times the original bid price. The prospect of respondents obtaining an enormous windfall at the expense of the public fisc—in contravention of Congress's express statutory directive to "avoid[] * * * unjust enrichment" and recover for the public "a portion of the value of the public spectrum," 47 U.S.C. 309(j)(3)(C) (1994 & Supp. IV 1998)—is itself powerful reason for further review.

B. This case also presents for this Court's resolution a direct conflict between the Fifth Circuit and the Second Circuit on a closely related and potentially recurring bankruptcy issue arising in this regulatory context. Under 11 U.S.C. 548(a)(2)(A), a bankruptcy trustee (or debtor-in-possession) "may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily * * * received less than a reasonably equi-

valent value in exchange for such transfer or obligation." Section 548, in effect, "provides after the fact protection to the debtor's creditors, by undoing a transaction engaged in by the debtor, * * * which either (i) had as its purpose an intent to hinder, delay or defraud the debtor's creditors, or (ii) was made while the debtor was in a precarious financial condition, and the transaction did not provide the debtor with a reasonably equivalent value in exchange for the item transferred or the obligation incurred." 5 Lawrence King, *Collier on Bankruptcy* ¶ 548.01, at 548-5 (15th ed. 1996). See also *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 540-541 (1994).

It is generally agreed that the question of reasonably equivalent value is determined by the value of the consideration exchanged at the time the exchange takes place. Consistent with the FCC's longstanding interpretation of its own rules and general principles of auction law, the Second Circuit in *NextWave* concluded that bidders incur the obligation to pay for licenses and the FCC loses its discretion with respect to awarding them—and reasonably equivalent value therefore must be measured—at the close of the auction.[14] In this case, the Fifth Circuit expressly disagreed

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[14] It is well settled that an agency's interpretation of its own regulations "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation," *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks and citations omitted), particularly where, as here, the regulation concerns "a complex and highly technical regulatory program," *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). In this case, the FCC's rules specifically addressed the prospect of a winning bidder's default between the auction and the time the licenses are issued. Had respondents defaulted during that period they would have been liable for the difference between the amount of their winning bid and the amount of the winning bid at a reauction of those licenses, *plus* three percent of the lower of the two winning bid amounts. 47 C.F.R. 1.2109(c), 1.2104(g)(2) (1996). Relying on that

with the Second Circuit's analysis and that result. Pet. App. 37a, 40a. The Fifth Circuit declined to defer to the FCC's construction of its own rules on the theory that it was a mere litigating position. *Id.* at 38a. And the Fifth Circuit concluded that the obligation to pay for the licenses did not arise until those licenses were actually granted, about 8 months after the auction. *Id.* at 46a-47a.

The Fifth Circuit's analysis is incorrect. The Commission's construction of its regulations, which repeatedly has appeared in the Commission's notice-and-comment rulings, was established in 1996, well before any of the C-Block litigation began. See Order, *BDPCS, Inc.*, 11 FCC Rcd 14,399 (1996), aff'd, 15 FCC Rcd 17,590 (2000); see also Memorandum Opinion and Order, *BDPCS, Inc.*, 12 FCC Rcd 3230 (1997) (reviewing 1996 Bureau decision). Moreover, the Fifth Circuit's reasoning is unpersuasive. The Commission's rules expressly declare that winning bidders are liable for the full amount of their bids, plus a penalty, less any amount the Commission recovers by re-auctioning the licenses (mitigation). See note 13, *supra*. A clearer statement that winning bidders become obligated to pay at the close of auction is difficult to imagine.

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provision, the FCC has formally interpreted its auction rules to provide that a "licensee's binding obligations to repay the original bid price for the licenses" is "incurred upon acceptance of the high bid." Order, *Applications for Assignment of Broadband Personal Communications Services Licenses*, 14 FCC Rcd 1126, ¶ 1 (1998). See also Public Notice, *Auction of C, D, E, and F Block Broadband PCS Licenses*, 13 FCC Rcd 24,540, 24,545 (1998) ("Under the Commission's rules, [the winning bidder] became obligated for its winning bid amounts when the auction closed."); Order, *C.H. PCS, Inc.*, 14 FCC Rcd 4131, 4132, ¶ 3 (1999) (under FCC auction rules, "default payment is equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission" precisely "[b]ecause, under the Commission's rules, a winning bidder is obligated to pay the full amount of its winning bid").

Indeed, for similar reasons, respondent received reasonably equivalent value even if one sets aside the question of when the payment obligation arose. The Commission's rules expressly provide that, in the event a winning bidder does not pay its full bid amount, it incurs a default liability in the amount of the bid, plus a three percent penalty, less the price the Commission obtains by re-auction. Note 13, *supra*. In view of that regulation, there can be no doubt that respondent, when it gave the FCC promissory notes some 8 months after the auction, received reasonably equivalent value, even if the licenses themselves had by that time fallen in value from the bid price of $1.06 billion to a mere $166 million. That is true because, in return for its $954 million promissory notes, respondent did not merely receive licenses worth (by the bankruptcy's court's estimate) $166 million. It also avoided incurring a default liability in the amount of $788 million, which is the difference between respondent's bid price of $1.06 billion and the $166 million the licenses would have fetched (using the bankruptcy court's estimated value) at re-auction; and it avoided a further penalty of $5 million (3 percent of the $166 million resale price). By any calculation, a promise to pay $954 million for a benefit of $959 million ($166 million in license value and the avoiding of $793 million in default liability) is reasonably equivalent value. The court of appeals' decision to deprive the Treasury of $900 million thus not only conflicts with the decision of the Second Circuit, but with basic principles of mathematics. For that reason too, it should be reviewed.[15]

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[15] Although the Commission has suspended the use of installment payments—lessening the frequency with which this issue will recur in the future—the issue retains sufficient importance to warrant this Court's review as part of the larger issues raised by the petition. Because the Commission is statutorily obligated to ensure that the winning bidder is qualified to hold the license before issuing it (but retains no discretion to deny the license if the bidder is qualified), a certain amount of delay

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

JACOB M. LEWIS
ROBERT M. LOEB
H. THOMAS BYRON III
Attorneys

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between the end of the auction and issuance of the license is inevitable; that delay may be substantial where the bidder needs to restructure itself to avoid, for example, limits on foreign ownership. (In view of the number of bidders involved in each auction, it would be neither workable nor sensible for the Commission to investigate and resolve the qualifications of each before the auction.) As a result, future auction winners that perceive a drop in the value of the licenses between the close of the auction and the date the licenses are awarded may seek to rely on the Fifth Circuit's decision by bringing a fraudulent conveyance action to avoid parts of their debts; bidders located in the Second Circuit, in contrast, will not be able to do so. Moreover, such inequality, if not resolved, may influence bidding behavior and distort auction outcomes.